

Appl. No. 10/136,001
Amdt. Dated 20-Jun-05
Reply to Office Action of 05/20/2005
Attorney Docket No. : 6045-006

Remarks/Arguments

In the Office Action dated May 20, 2005, the Examiner issued a requirement for restriction under 35 U.S.C. §121 to one of the following inventions:

- I. Claims 9-19, drawn to a scooping apparatus classified in class 294, subclass 55; and
- II. Claim 20, drawn to a method to transport food, classified in class 99, subclass 426.

The Examiner has further issued a species restriction between the following groups:

1. the species of Figs. 1 and 2;
2. the species of Figs. 3 and 4.

In response, Applicant elects to prosecute Claims 9-10 of Group I without traverse. Further, Applicant provisionally elects to prosecute species 1, i.e., of Figs. 1 and 2, with traverse. As the Examiner correctly notes, Claim 9 is currently generic.

Accordingly, the present amendment has cancelled non-elected Claim 20 of Group I, subject to Applicant's right to file divisional applications directed to the same.

Applicant respectfully requests examination on elected claims 9-19.

With respect to the species restriction requirement, Applicant traverses on the basis that the Examiner has not satisfied the burden imposed under MPEP §803 of making a *prima facie* showing that searching the identified species together imposes a serious burden on the Examiner. For the Examiner to make a *prima facie* showing, the Examiner must demonstrate by either an appropriate explanation of separate classification or separate status in the art, or a different field of search as defined in MPEP § 808.02. Only after such a *prima facie* showing made, is Applicant required to rebut by making appropriate showings or proffering appropriate evidence. That *prima facie* showing may be rebutted by appropriate showings or evidence by the applicant. Applicant respectfully submits that the Examiner's Restriction Requirement is improvidently issued and fails to comport with the requisite *prima facie* showing required by MPEP §803. The Examiner has failed to establish that searching the purported species and sub-species imposes a serious burden upon the Examiner. The Examiner has

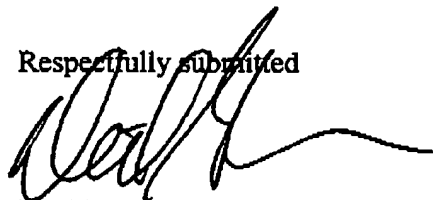
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not alleged or argued that the purported species have attached separate classification, separate status in the art or are in a different filed of search. Accordingly, the requirement for Applicant to elect between species is submitted to be improvidently made.

This Amendment is being concurrently filed with an Amendment Transmittal Letter including a fee calculation sheet, any applicable Request for Extension, and fee calculations. The Director is authorized to deduct any additional expenses from Deposit Account No. 18-2000, of which the undersigned is an authorized signatory.

Should the Examiner find that there are any outstanding matters which are susceptible of resolution by telephone interview, the Examiner is invited to telephone the undersigned to discuss the same.

Respectfully submitted



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